

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC-SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC#:
DATE FILED: 5/4/2020

STRIKE 3 HOLDINGS, LLC,

Plaintiff,

v.

JOHN DOE *subscriber assigned IP address*
98.15.76.224,

Defendant.

No. 20-CV-1529 (RA)

ORDER

RONNIE ABRAMS, United States District Judge:

On February 20, 2020, Plaintiff Strike 3 Holdings, a company that owns adult motion pictures, filed this copyright infringement action against Defendant John Doe alleging that “Defendant is committing rampant and wholesale copyright infringement by downloading Strike 3’s motion pictures as well as distributing them to others.” *See* Compl., Dkt. 1 ¶¶ 3-4. Plaintiff has identified Defendant only through his or her IP address. *Id.* ¶ 5. Now before the Court is Plaintiff’s *ex parte* motion, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third-party subpoena on Spectrum, Defendant’s internet service provider (“ISP”), to identify Defendant’s name and address. Dkt. 7.

LEGAL STANDARD

Under Rule 26(d)(1), a party “may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized . . . by court order.” “When considering whether to grant a motion for expedited discovery prior to the Federal Rules of Civil Procedure Rule 26(f) conference, courts apply a ‘flexible standard of reasonableness and good cause.’” *adMarketplace, Inc. v. Tee Support, Inc.*, No. 13 Civ. 5635 (LGS), 2013 WL 4838854,

at *2 (S.D.N.Y. Sept. 11, 2013) (quoting *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012)). “The Second Circuit has identified the ‘principal factors’ for District Courts to consider when determining whether expedited discovery is appropriate,” including “(1) the plaintiffs ability to make out a prima facie showing of infringement, (2) the specificity of the discovery request, (3) the absence of alternative means to obtaining the information sought in the subpoena, (4) the need for the information sought in order to advance the claim, and (5) the Defendant’s expectation of privacy.” *Strike 3 Holdings, LLC v. Doe*, 329 F.R.D. 518, 521 (S.D.N.Y. 2019) (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010)).

DISCUSSION

Application of each of the principal factors weighs in favor of granting Plaintiff’s motion. First, Plaintiff has established a prima facie case of copyright infringement. “To make out a prima facie case of copyright infringement, a party must show (1) ownership of a valid copyright in the item and (2) unauthorized copying.” *Int’l Swaps & Derivatives Ass’n, Inc. v. Socratek, L.L.C.*, 712 F.Supp.2d 96, 102 (S.D.N.Y. 2010) (citing *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003)). Plaintiff’s complaint describes the copyrighted works at issue and alleges that Plaintiff used a copyright infringement detection system, “VXN Scan,” to discover Defendant’s use of the BitTorrent file sharing network to download and distribute Plaintiff’s works. See Dkt. 1 ¶¶ 14-46 & Ex. A (list identifying infringed works); see also *Strike 3 Holdings, LLC*, 329 F.R.D. at 521 (finding first factor met in similar case). Accordingly, the first factor weighs in Plaintiff’s favor.

Second, Plaintiff “has limited its scope of discovery to the defendant’s name and address, which previous courts in similar cases involving the same plaintiff have found ‘is a limited and highly specific set of facts.’” *Strike 3 Holdings, LLC v. Doe*, No. 19-CV-5866 (AT) (RWL), 2019

WL 4493342, at *2 (S.D.N.Y. Aug. 21, 2019) (quoting *Strike 3 Holdings, LLC* v. Doe, No. 18-CV-5586 (LAK) (KNF), 2018 WL 5818100, at *1 (S.D.N.Y. Oct. 15, 2018)); *see also Strike 3 Holdings, LLC*, 329 F.R.D. at 521. The Court agrees that the information that Plaintiff seeks is sufficiently narrow.

Third, Plaintiff argues that a third-party subpoena to Defendant's ISP is the only means by which it can ascertain Defendant's identity. Dkt. 8 at 7. Plaintiff contends that at present, it is "is only able to identify John Doe with reference to his or her IP address," and "[t]he only entity that can correlate the IP address to its subscriber and identify Defendant as the person assigned the IP address is Defendant's ISP." *Id.* Numerous courts in this district have found the third factor met in analogous cases involving the same Plaintiff. *See, e.g., Strike 3 Holdings*, 2019 WL 4493342, at *2; *Strike 3 Holdings, LLC*, v. Doe, No. 19-CV-1651 (AT) (JLC), 2019 WL 1211864, at *2 (S.D.N.Y. March 15, 2019); *Strike 3 Holdings, LLC*, 329 F.R.D. at 521-22. Plaintiff has therefore established that it can only obtain Defendant's contact information through a subpoena of his or her ISP.

Fourth, Plaintiff will be unable to serve Defendant and pursue this action in the absence of the information it seeks from Defendant's ISP. *See, e.g., Strike 3 Holdings, LLC*, 2019 WL 4493342, at *2; *Strike 3 Holdings, LLC*, No. 19-CV-1651, 2019 WL 1211864, at *2; *Strike 3 Holdings, LLC*, 329 F.R.D. at 522.

"Finally, while the Court is sensitive to the fact that Defendant's viewing of these particular copyrighted works may be the source of public embarrassment, courts in this district have nonetheless concluded that 'ISP subscribers have a minimal expectation of privacy in the sharing of copyrighted material.'" *Strike 3 Holdings, LLC*, 329 F.R.D. at 522 (quoting *Malibu Media*,

LLC v. John Does 1-11, 12-cv-3810 (ER), 2013 WL 3732839, at *6 (S.D.N.Y. July 16, 2013)); *see also Strike 3 Holdings, LLC*, 2019 WL 4493342, at *2.

CONCLUSION

As each of the five factors weighs in Plaintiff's favor, the Court hereby grants Plaintiff's motion. Consistent with the "[c]ourt's practice in these sorts of cases," the Court will also issue a protective order in connection with the subpoena, "in light of the substantial risk for false positive identifications that could result in 'annoyance, embarrassment, oppression, or undue burden or expense.'" *Strike 3 Holdings, LLC*, 329 F.R.D. at 522 (quoting Rule 26(c)(1)).

Accordingly, it is hereby:

ORDERED that Plaintiff may immediately serve a Rule 45 subpoena on Spectrum, the ISP identified in its motion, to obtain information to identify John Doe, specifically her or his true name and current and permanent address. Plaintiff is expressly **not** permitted to subpoena the ISPs for John Doe's email addresses or telephone numbers. The subpoena shall have a copy of this order attached, along with the attached "Notice to Defendant."

IT IS FURTHER ORDERED that Spectrum will have *60 days* from the date of service of the Rule 45 subpoena upon them to serve John Doe with a copy of the subpoena, a copy of this order, and a copy of the "Notice to Defendant." *The order should be attached to the "Notice to Defendants" such that the "Notice to Defendant" is the first page of the materials enclosed with the subpoena.* Spectrum may serve John Doe using any reasonable means, including written notice sent to her or his last known address, transmitted either by first-class mail or via overnight service.

IT IS FURTHER ORDERED that Spectrum will have *60 days* from the date of service of the Rule 45 subpoena upon them to serve John Doe with a copy of the subpoena, a copy of

this order, and a copy of the “Notice to Defendant.” *The order should be attached to the “Notice to Defendants” such that the “Notice to Defendant” is the first page of the materials enclosed with the subpoena.* Spectrum may serve John Doe using any reasonable means, including written notice sent to her or his last known address, transmitted either by first-class mail or via overnight service.

IT IS FURTHER ORDERED that if that 60-day period lapses without John Doe or Spectrum contesting the subpoena, Spectrum shall have *10 days* to produce the information responsive to the subpoena to Plaintiff. John Doe, should he or she move to quash the subpoena or to proceed anonymously, shall at the same time as her or his filing also notify Spectrum so that it is on notice not to release any of John Doe’s contact information to Plaintiff until the Court rules on any such motions.

IT IS FURTHER ORDERED that the subpoenaed entity shall preserve any subpoenaed information pending the resolution of any timely-filed motion to quash.

IT IS FURTHER ORDERED that Spectrum shall confer with Plaintiff and shall not assess any charge in advance of providing the information requested in the subpoena. Should Spectrum elect to charge for the costs of production, it shall provide a billing summary and cost report to Plaintiff.

IT IS FURTHER ORDERED that Plaintiff shall serve a copy of this Opinion and Order along with any subpoenas issued pursuant to this order to Spectrum.

IT IS FURTHER ORDERED that any information ultimately disclosed to Plaintiff in response to a Rule 45 subpoena may be used by Plaintiff solely for the purpose of protecting Plaintiff’s rights as set forth in its complaint.

IT IS FURTHER ORDERED that the initial conference presently scheduled for May 8, 2020 is hereby adjourned *sine die*.

The Clerk of Court is respectfully directed to terminate the motions pending at Dkt. 7 and Dkt. 9.

SO ORDERED.

Dated: May 4, 2020
New York, New York

A handwritten signature in blue ink, appearing to read 'Ronnie Abrams', is written above a horizontal line.

Ronnie Abrams
United States District Judge

NOTICE TO DEFENDANT

1. You are a defendant in *Strike 3 Holdings, LLC. v. John Doe*, 20-cv-1529 (RA), a case now pending before the Honorable Ronnie Abrams, United States District Judge for the Southern District of New York.
2. Attached is Judge Abram's Order, dated May 4, 2020 which sets forth certain deadlines and procedures related to this case.
3. You may hire a lawyer to represent you in this case or you may proceed *pro se* (that is, you may represent yourself without the assistance of a lawyer). If you choose to proceed *pro se*, all communications with the Court should be through the *Pro Se* Office of the United States District Court for the Southern District of New York. The *Pro Se* Office is located in Room 230 of the United States Courthouse, 500 Pearl Street, New York, N.Y. 10007, and may be reached at (212) 805-0175.
4. The plaintiff in this case has filed a lawsuit claiming that you have illegally downloaded and/or distributed a movie on your computer.
5. The plaintiff may not know your actual name or address, but it does know the Internet Protocol address ("IP address") of the computer associated with the alleged downloading and/or distributing.
6. The plaintiff has filed subpoenas requesting your identity and contact information from your Internet Service Provider ("ISP").
7. If you do not want your ISP to provide this information to the plaintiff and you believe there is a legal basis for the ISP to withhold the information, you may file a motion to "quash" or "modify" the subpoena. This must be done within 60 days of the date that you receive notice from your ISP that you are a defendant in this case. If you choose to proceed *pro se*, your motion

to quash or modify the subpoena should be mailed to the *Pro Se* Office, as described in paragraph 3.

8. If you move to quash the subpoena or otherwise move to prevent your name from being turned over to the plaintiff, you may proceed anonymously at this time. Nevertheless, if you are representing yourself, you will have to complete an information card that you can obtain from the *Pro Se* Office of the Court. This information is *solely for use by the Court* and the Court will not provide this information to lawyers for the plaintiff unless and until it determines there is no basis to withhold it. The Court must have this information so that it may communicate with you regarding the case.

9. Even if you do not file a motion to quash or modify the subpoena, you may still proceed in this case anonymously at this time. This means that the Court and the plaintiff will know your identity and contact information, but your identity will not be made public unless and until the Court determines there is no basis to withhold it.

10. If you want to proceed anonymously without filing a motion to quash or modify the subpoena, you (or, if represented, your lawyer) should provide a letter stating that you would like to proceed anonymously in your case. If you choose to proceed *pro se*, your letter should be mailed to the *Pro Se* Office, as described in paragraph 3. This must be done within 60 days of the date that you receive notice from your ISP that you are a defendant in this case. You should identify yourself in your letter by the case in which you are a defendant and your IP address. If you submit this letter, then your identity and contact information will not be revealed to the public unless and until the Court says otherwise.